1995

Legal Emotion: The Women's Story in Totem and Taboo

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LEGAL EMOTION: THE WOMEN'S STORY IN *TOTEM AND TABOO*

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My aim is to uncover the unconscious emotions characteristically associated with some basic legal institutions. These emotions are ones we invariably have when we follow or enforce rules, fulfill duties, and claim or exercise rights. We know the conscious emotions that we experience—the cruelty of rules and our fear of them, the hopes in rights, security of duties, and so forth. Yet not all the emotions that we encounter in basic legal institutions are conscious. We experience unconscious emotions as well.

I assume, to begin with, that a set of unconscious emotions accompanies each basic legal institution and that each basic institution has its own unique set of unconscious emotions.[1] Thus, whenever we encounter a basic institution, we have the set of unconscious emotions associated with it, regardless of the institu-

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[1] I use the term "basic institution" to describe exactly those institutions that are accompanied by a unique and permanent set of unconscious emotions. Institutions, in general, may or may not be accompanied by a unique and permanent set of unconscious emotions. An institution qualifies as "basic" only if one is convincingly able to show the existence of such a set.

An institution describes a recurring pattern of interactions motivated by a stable set of ideas that participants in the institution regard as being expressed or "instituted" in the interactions. Both a recurring pattern of interactions and a stable set of ideas are necessary to the definition. Also, a participant in an institution may either engage in interactions or observe others engaging in interactions. The mark of an institution is that the participants engage in interactions that they, along with those who participate merely by observing, regard as expressing the same ideas.

Thus, commuters who regularly catch the 7:49 out of Greenwich likely do not have an institution, even though they engage in a regular pattern of interactions, because they have no stable set of ideas that each regards the interactions as expressing. If, however, four of them regularly have a bridge game on the 7:49, these four would have an institution, and to the extent nonplayers consciously leave open a row of seats for them, they, too, would be participating in the institution, as observers. By the same token, Congress is an institution because congressmen, committee staffs, and lobbyists engage in a recurring pattern of interactions that they (and the press and public as observers) all regard as expressing a stable set of ideas.

Nevertheless, Congress does not qualify as a "basic institution," in my terms, because I do not believe anyone can show that the pattern of interactions and set of ideas expressed by Congress may be associated with a unique and permanent set of unconscious emotions. However, rule, right, and duty—these legal institutions do qualify as basic because I believe it is possible to make out a unique and permanent set of unconscious emotions accompanying each of them.

tion's manifest legal content. We may have all sorts of other conscious and unconscious emotions about the manifest content, but we always associate the same set of unconscious emotions with each basic institution. It may be that manifest content, too, is distributed among basic institutions in characteristic ways, so that one sort of content comes always as rules, another as rights, and a third as duties. I take no position on that possibility. I suggest only that each basic legal institution may be associated with its own set of unconscious emotions, regardless of manifest content.

I assume also that the sets of characteristic unconscious emotions came into being genealogically, and can be known and understood using the genealogical method.[2] Freud himself used the genealogical method in *Totem and Taboo* to explore the historical origins of the Oedipus crisis, specifically the events that led to the totem taboos—the prohibitions and licenses surrounding totem animals and the prohibition against incest. "The taboo prescriptions," Freud wrote in *Civilization and Its Discontents*, "were the first 'laws.' "[3] Nevertheless, though Freud viewed the Oedipus crisis as having arisen in the same moment and as a consequence of the same events as the totem taboos, he did not trace the emotions experienced by the participants in those events the other way, into basic legal institutions.

As applied to the psychology of institutions, the genealogical method assumes that the conscious emotions experienced by the creators of (or first participants in) an institution may be found as the unconscious emotions of participants in subsequent forms of the institution. The conscious emotions of participants in subsequent forms may be, and usually are, quite different from the creators' conscious emotions. Nevertheless, the genealogical method searches for unconscious emotions experienced by participants in subsequent forms of an institution that are the same as certain conscious emotions experienced by the creators of the institution.

The genealogical approach is justified when participants in subsequent forms of an institution can be brought to acknowledge

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2 Whether they can be known in other ways is another matter that Jürgen Habermas, for one, explores. *See* JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (Jeremy J. Shapiro trans., Beacon Press 1972) (1968).

3 SIGMUND FREUD, DAS UNBEHAGEN IN DER KULTUR 94 (1972) (my translation) (The German reads, "Die Tabuvorschriften waren das erste 'Rechte.' "); *see also* SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 48 (James Strachey trans., W.W. Norton & Co. 1962) (1930). Because English translations of Freud are sometimes imprecise, I have translated Freud's German, where possible, and provided page numbers for an English edition as reference.

the unconscious emotions once consciously experienced by the creators of the institution, by presenting the emotions to them in a story. This is a version of the test of validity in psychoanalysis.[4]

The genealogical approach to uncovering unconscious legal emotions calls for plausibly recreating the conscious emotions of the creators of the first laws, then tracing those emotions into such unconscious emotions as participants in subsequent legal institutions can be brought to acknowledge. Freud traced the conscious emotions of the creators of the first laws into the Oedipus crisis and the unconscious emotions of neurotics, but not into subsequent legal institutions. The first task, then, is to examine the story in *Totem and Taboo* from the perspective of legal theory in order to make up the missing half of Freud's exploration. We must ask whether Freud's story is plausible in its own terms, and whether the genealogy of legal emotions it suggests is complete or accurate. We will find that Freud's story is implausible in some respects, and its genealogy of legal emotions incomplete and inaccurate. The second task, then, is to retell Freud's story, making it plausible in its own terms, then to suggest a more complete and accurate genealogy of legal emotions.

My scrutiny and retelling of Freud's story suggests three differences with Freud's conclusions:

(1) Freud says that the first laws were the totem taboos and the prohibition against incest. My retelling of Freud's story suggests that the first law was the prohibition against cannibalism, and that the totem taboos and prohibition against incest followed upon the prohibition against cannibalism through a series of events much like the ones Freud describes.

(2) Freud regards the first laws as the product of men's desires including their desire for power over other men and women. I regard the basic legal institutions as a product of women's desires as well as men's, and of a struggle for power between men and women. Indeed, the law I regard as first (the prohibition against cannibalism) is, if anything, women's law, unlike the laws Freud regards as first (the prohibitions and licenses surrounding the totem animal and the prohibition against incest) which he wrongly, in my view, regards as men's law only.

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[4] The difference is that the story by which participants in a basic institution are led to consciousness of the unconscious emotions accompanying participation in the institution is not one they participate in telling, unlike the story in an analysis, since the story of an institution is not that of any one participant in the institution, but rather the story of all participants together.

(3) Freud associates the totem taboos with "the son's consciousness of guilt" for wanting to kill the father, and the incest taboo in particular with a "practical" decision by the band of brothers not to battle each other for sexual possession of their mother and sisters.[5] I associate the basic institutions of law with a series of emotions and repressions including, but not limited to, "the son's consciousness of guilt."

My retelling of Freud's story also suggests unconscious emotions accompanying the basic legal institutions in addition to the emotions accompanying the prohibitions that interested Freud. The basic institutions to which I assign unconscious emotions include right, duty, and rule, as well as prohibition.

FREUD'S STORY

The story in *Totem and Taboo* is based on Darwin's "historical deduction" about the origins of the incest taboo and the institution of exogamous marriage in the primal horde.[6] The story Darwin tells is that of a violent, jealous father who dominates a horde, keeps all the women for himself, and drives out his growing sons. When the sons find mates outside the horde, they do the same to their sons, and so on. The incest taboo and exogamous marriage simply describe or express these practices. If Darwin's story is true, Freud reasons, then the incest taboo would have preceded totemism. However, Emile Durkheim's explanation for exogamous marriage, Freud points out, requires just the opposite, that totemism precede the incest taboo.[7] Freud's "fantastic hypothesis"[8] is that both institutions, totemism and the incest taboo, appeared simultaneously in one series of events.

It is to justify this "fantastic hypothesis" that Freud spins his yarn.[9] "One day," he begins,

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[5] SIGMUND FREUD, TOTEM UND TABU: EINIGE ÜBEREINSTIMMUNGEN IM SEELENLEBEN DER WILDEN UND DER NEUROTIKER 198 (Fischer Taschenbuch 1991) (1914) [hereinafter TOTEM UND TABU] (my translation); SIGMUND FREUD, TOTEM AND TABOO: SOME POINTS OF AGREEMENT BETWEEN THE MENTAL LIVES OF SAVAGES AND NEUROTICS 178-79 (James Strachey trans., W. W. Norton & Co. 1989) (1913) [hereinafter TOTEM AND TABOO].

[6] TOTEM UND TABU, *supra* note 5, at 178-79 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 155-56.

[7] TOTEM UND TABU, *supra* note 5, at 179-80 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 156-57.

[8] TOTEM UND TABU, *supra* note 5, at 195 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 175.

[9] Freud narrates his story in the style of a fairy tale of the brothers Grimm. Freud explains why, indirectly, in a curious footnote just at the beginning of the story: "In addi-

> the brothers who had been driven out joined together, killed and devoured the father, and so put an end to the father's horde. United, they dared and accomplished what would have remained impossible for them separately. (Perhaps an advance in culture, the use of a new weapon, had given them the feeling of dominance.) That these cannibalistic savages also ate their kill is self-evident. The brutal primal father was certainly the envied and feared model for each of the band of brothers. Then they accomplished their identification with him in the act of devouring him, each appropriating a part of his strength. The totem meal, perhaps mankind's first festival, would be the repetition and commemoration of this memorable, criminal deed with which so many things began—social organization, ethical restrictions, and religion. In order to find these consequences believable, apart from the presupposition, one need only suppose that the conspiring band of brothers were dominated by the same conflicting feelings towards the father that we can identify as the content of the ambivalence of the father complex in each of our children and our neurotics. They hated the father, who stood so powerfully in the way of their need for power and their sexual demands, but they also loved and admired him. After they had eliminated him, satisfied their hate and accomplished their wish for identification with him, the tender emotions, which at present were subdued, were bound to assert themselves. It happened in the form of remorse. There began a consciousness of guilt which here coincided with the generally felt remorse. The dead father now became stronger than the living one had been; all this we see today in the fates of men. What had earlier been prevented by his existence, they themselves now prohibited themselves in the psychic situation, so well known to us from analyses, of "deferred obedience." They disavowed their deed by declaring the killing of the father substitute, the totem, not to be permitted, and renounced its

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tion to this presentation, which could otherwise prove misleading, please consider the concluding sentences of the following footnote." TOTEM UND TABU, *supra* note 5, at 196 n.1 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 176 n.54. The "concluding sentences" say: "I may ascribe the indefiniteness, temporal foreshortening, and substantive condensation in my explanations above to a restraint that the nature of the subject demands. It would be just as absurd to strive for exactness in this material as it would be unreasonable to demand certainty." TOTEM UND TABU, *supra* note 5, at 196 n.2 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 176 n.55.

It is interesting that Dr. Brill, Freud's translator, makes a slip, translating "Anmerkung" as "chapter," instead of "footnote." *See* SIGMUND FREUD, TOTEM AND TABOO: RESEMBLANCES BETWEEN THE PSYCHIC LIVES OF SAVAGES AND NEUROTICS 183 n.77 (A.A. Brill trans., Random House 1946) (1913). Perhaps he was imitating Freud and doing him one better, seeking to draw attention further away from Freud's confession of inexactness and uncertainty by adding error to indirection.

> fruits by denying themselves the liberated women. Thus they created the two fundamental taboos of totemism out of the *son's consciousness of guilt*, which for this very reason had to correspond to the two repressed wishes of the Oedipus complex. Whoever acted to the contrary made themselves guilty of the only two crimes which troubled primitive society.[10]

Freud continues:

> The two taboos of totemism with which the ethical life of mankind begins are psychologically not equivalent. Only one, the sparing of the totem animal, rests entirely upon motives based upon feeling; the father had truly been eliminated, for which nothing in reality was to make amends. But the other, the prohibition against incest, had a strong practical foundation as well. Sexual need does not unite men, but separates them. Though the brothers had bound together in order to suppress the father, each was the other's rival for the women. Each wanted to have them all to himself, like the father, and in the battle of all against all the new organization would have perished. For there was no longer a strongest who could have assumed the father's role with success. Thus nothing remained for the brothers, if they wanted to live together, but to set up—perhaps after overcoming difficult incidents—the prohibition against incest, by which they all at once renounced the women they desired, on whose account above all they had eliminated the father. Thus they saved the organization which had made them strong and which could rest upon homosexual feelings and activities, which may have appeared among them in the time of their expulsion. Perhaps this was the situation too that sowed the germ of the institution of *matriarchy* recognized by [Johann] Bachofen, until it was cut off by the patriarchal family structure.[11]

THREE PUZZLES

Freud's story presents three puzzles about the motives of the men for taking certain actions and not taking others. It also says nothing about actions of the women, or any motives they may have had for doing nothing, if indeed that is what they did. Let us tackle the puzzles in order.

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10 TOTEM UND TABU, *supra* note 5, at 196-98 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 176-78.

11 TOTEM UND TABU, *supra* note 5, at 198-99 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 178-79.

1. *Why did the brothers eat the father?*

Freud says it is "self-evident" that the brothers were cannibals. Eating the father was not a reaction to anyone's deeds. It is simply "self-evident" that the brothers would have done this. Freud's explanation for why the brothers killed the father is very different. The father was "brutal," Freud says, "the envied and feared model for each of the band of brothers."[12] Killing the father was a reaction to the father's deeds. The plot itself introduces the motive—motive flows from the narrative. Nevertheless, despite a lack of narrative motive, Freud must have it that the brothers ate the father because Freud wants to explain the totem meal as "the repetition and commemoration of this memorable, criminal deed."[13]

By describing the brothers' cannibalism as "self-evident" Freud avoids saying why they were cannibals. The cannibalism need not be motivated only if what one ate then did not matter. But then, psychoanalysis would ask why it did not matter. It is, of course, more likely that what one ate did matter quite a bit, just as now, and that cannibalism was always accompanied by certain standard emotions, as well as individual variations on standard emotions.

Though Freud does not tackle the motives behind cannibalism, he is, of course, keenly aware that this particular act of cannibalism was filled with emotion: "Then [the brothers] accomplished their identification with [the father] in the act of devouring him, each appropriating a part of his strength."[14] Eating the father, if not cannibalism generally, had the highest interest for Freud as the trigger of a profound emotional development amongst the brothers. Nevertheless, though Freud does not say this, it appears that the brothers' desire to identify with the father may have arisen just as they were in the midst of eating him, or may have attached itself to the act of eating him as a symbol of their identification. It was not necessarily one of the motives for starting to eat him, which, as Freud suggests, these cannibals would have done anyway.

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12 TOTEM UND TABU, *supra* note 5, at 196 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 176.

13 TOTEM UND TABU, *supra* note 5, at 196 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 176.

14 TOTEM UND TABU, *supra* note 5, at 196 (my translation); *see also* TOTEM AND TABOO, *supra* note 5, at 176.

2. *Why did the father expel the brothers, and not kill them?*

The father tolerated the brothers on the fringes of the horde, though they remained sexual competitors.[15] When their turn came, by contrast, the brothers did not tolerate the father.[16] Freud does not say directly why the father did not kill the brothers, but his story does hint at an explanation.

The brothers loved the father, Freud says, but also hated him for overpowering them and keeping them from the women. The father hated his sons,[17] if at all, only as sexual competitors, not as a source of deprivation. The father must also have loved them. Otherwise, he would have killed them, as he undoubtedly killed other men, simply because they were competitors. Freud's position must be that the father's love for his sons was sufficiently powerful to overcome his hatred of them as sexual competitors, whereas the sons' love for their father was not sufficiently powerful to overcome their hatred of him for overpowering them and keeping them from the women.

Even so, balancing emotions is a difficult business.[18] Who is to say whether love or hate is the stronger, why in one case the balance leads to murder, in another not? Perhaps it is easier to understand the sons' action as the consequence of an emotional logic, rather than as the resultant of emotional vectors. Freud's story does suggest two candidate systems of logic.

The first focusses on the difference between an act and a threat. The father angered the sons by acting, exiling them to the fringes of the horde. The sons angered the father only by threatening to act.[19] One logic would be that a deed is more offensive than the threat of a deed, and that a deed calls for a responsive deed, whereas a threat calls for a response other than a deed.

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15 Whether they remained competitors for the women after they started their homosexual activities is a different question. Certainly at the beginning of their exile, before starting the homosexual activities, they remained heterosexual competitors.

16 Thus, sexual competition could not have been the brothers' sole motive for killing (or eating) the father. If the brothers wanted only to get rid of the father as a sexual competitor, all they had to do was drive him away. They did not have to kill (or eat) him. After all, the father was able to drive them away without killing or eating them when he was the stronger.

17 Throughout the story, Freud refers to the sons only as "brothers." I have chosen generally to preserve Freud's usage, but drop it here because the brothers' relationship to the father is more important here than their relationship to each other. By choosing to call the sons "brothers," Freud emphasizes that their actions in the story toward each other are more important than their actions towards the father. This is a curious, but understandable, choice.

18 As difficult as balancing tests in law.

19 Maybe the father did kill and eat sons who actually had sexual relations with women.

A second logic focusses on the desire of the sons to identify with the father. The sons may, after all, have killed the father in order to eat him and thereby get his strength. The father would not have had the same motive to kill the sons.

Obviously, neither logic may be compelling.[20] The difficulty with the first is that a person may be more incensed by a threat than by a deed.[21] The difficulty with the second is that fathers may have as powerful a motive to eat sons as sons do their fathers. So, at least, Greek mythology supposes.[22] But the test is whether the logic is a possible logic, not whether it is the most probable. It may be that the sons, for a reason we do not know, considered one or the other logic compelling to them. It may be that sons in other hordes, confronted by similar fathers, felt the force of a different logic, again for reasons we do not know. Nevertheless, in order to make his genealogical proof, Freud does not need for a logic to be universal, only the logic of possible sons in a possible horde. This horde would then be the source of the cultural and emotional patterns Freud wishes to explain genealogically. Other hordes, whose sons were driven by different sorts of logic, would lead to other cultural forms that handle the incest taboo and the Oedipus crisis differently.[23]

3. *Did the brothers, once expelled, continue to want the women?*

Freud assumes either that the brothers never ceased being heterosexual, or that, if they did, they would revert to heterosexual activities as soon as the practical obstacles to sexual relations with the women were gone. He bolsters these assumptions by suggesting that the brothers had homosexual feelings only after the father expelled them, and only as a *practical* consequence of the unavailability of women with whom to have sexual relations.[24] The

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20 For example, sociobiologists would propose an evolutionary, rather than an emotional, logic. Fathers who ate their sons reduced their contribution to the gene pool, so evolution selected out the trait of eating sons. But it is just as likely a story that fathers who ate sons increased their contribution to the gene pool, because they were then able to mate with a larger number of women. Whichever story is true, however, we must still find the emotional mechanisms that led only some fathers to eat sons.

21 I am reminded of the chess maxim: The threat is more powerful than the execution.

22 Fathers do not eat daughters, presumably because they can use daughters for sexual pleasure as well as food, and the desire for sexual pleasure trumps the desire for food, at least in some discernable group of people.

23 On these matters, see GANANATH OBEYESEKERE, THE WORK OF CULTURE: SYMBOLIC TRANSFORMATION IN PSYCHOANALYSIS AND ANTHROPOLOGY (1990).

24 TOTEM UND TABU, *supra* note 5, at 198; *see also* TOTEM AND TABOO, *supra* note 5, at 178-79.

sons must then originally have been solely heterosexual and remained heterosexual even as they engaged in opportunistic homosexual activities and developed homosexual feelings for one another.

If the sons were heterosexual by inclination and homosexual by necessity only, why did they keep their homosexual organization once the women became available? Freud says they wished to maintain the organization that made them strong. But what does it mean to be strong once the horde is without a father? Strength presumably stopped men of other hordes from taking women of the brothers' horde. But these are the very women the brothers were renouncing, not just for the practical reasons Freud describes, but also because of their feelings. Why then would they care if men from other hordes took them?

If the brothers' homosexuality had staying power for other reasons, is it obvious that they would want to revert to heterosexual activities? Indeed, they did not revert, at least with the women of their horde, on whose account they had just killed the father. Freud chalks up the sons' rejection of the women to their "consciousness of guilt," but it is just as likely the result of other feelings in addition to, or instead of, "consciousness of guilt." They might have become indifferent to the women during exile and continued to be so after. They might have been angry at the women for rejecting them and remained angry once the women stopped rejecting them.

Perhaps the brothers maintained their homosexual organization because they had homosexual feelings before the expulsion and continued to have them after. If they did, then surely the father did too. The love Freud says they felt for the father would then have been based as much on "homosexual feeling" as on any other feeling, so far unexplained, such as the love of a child for a parent. And the homosexual love the father must have felt for his sons must have influenced his decision in favor of expelling the sons over killing them. Yet the very emotion that explains the father's decision not to kill the sons—his homosexual love—renders the occasion for making the decision implausible.

RETELLING FREUD'S STORY

In order to resolve the puzzles raised by Freud's telling of the story, it is necessary to tell it again. "One day," the story begins:

> a troop lost all its men but one—a child. Perhaps the others wandered off. Perhaps they died. But they were gone. The

men and women of the troop had been bisexual, as men and women generally were in those days.[25] Because they were bisexual, it never occurred to them to be cannibals—the prudent sexual manager does not eat what he or she loves. Troops such as this had gone for ages without change, for the original bisexual, noncannibal condition must have been quite stable. But the accident that befell the men of this troop must have produced a violent change in the feelings and ideas of the surviving male child, hence in his troop, as he grew to sexual maturity. Different accidents undoubtedly disturbed other troops in different ways, leading to other changes and cultural developments. But the accident that befell this troop—the disappearance of all but one male—led it to become Darwin's and Freud's primal horde. The primal horde, then, is the result of one disturbance to the troop of bisexuals, expressing only one possible cultural formation of the Oedipus crisis and the laws surrounding it.

As the surviving boy grew to sexual maturity, he formed sexual attachments to women only, for there were no men. Also, he did not see women of his troop having sexual relations with other men. Because he did not see other men having sexual relations with women, he grew up thinking that his sexual relations with the women were just like his childish relations with them. Love for him was always mother love. He had no model of any other. So far as he knew, women loved no other man but him. This led easily to the thought that only he could love the women. Not seeing other men having sexual relations with his mother and sisters and daughters, and not having sexual

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25 Contrary to *Totem and Taboo*, Freud assumes a bisexual original condition in CIVILIZATION AND ITS DISCONTENTS, *supra* note 3. Freud and Darwin might very well have sought confirmation of their view on the original condition of human groups from the way of life of social primates, such as baboons. Baboon troops show more or less the same characteristics as the primal horde. If one believes, as Darwin and Freud (in *Totem and Taboo*) did, that human groups descend from animals much like baboons, then the primal horde, not the bisexual troop of this story and *Civilization and Its Discontents*, is the right idea about the original condition.

Surely, however, baboon troops have a history, a "Totem and Taboo," as much as we. Why assume that baboon troops are in the original condition? It is possible that they evolved into a primal horde just as the bisexual troop I am describing did. The difference may be that the baboon troop could not go on from there because baboons lacked the symbolic capacities that will prove decisive for the band of brothers of the troop here.

Or, assume (as is likely the case) that the baboon and human troops were originally as baboon troops are today. Even then it is probable that the human troop went through an intermediate stage of bisexuality, which may have been the consequence of a decision by human troops to pay attention to anal matters of cleanliness and form. The story here, to be complete, would have to deal with the change from the original baboon condition to a bisexual troop with conceptual abilities and anal attentiveness. That story, however, is shrouded in even greater mystery than the one I am telling.

relations himself with other men, he decided that all men were his enemies for the sexual attentions of the women.

The surviving son of this fateful troop became the first heterosexual—the primal father. He was undoubtedly jealous, not only of men having sexual relations with the women, but also of the women having sexual relations with each other. These he may have stopped, by force in the case of women who were his contemporaries, and by training in the case of daughters. Or, he may not have tried to stop sexual relations among the women, in which case they would have become heterosexuals at a later stage of moral and cultural development. What, however, did the father do with his sons?

At first, probably nothing. He had renounced his homoerotic feelings, so the sons certainly were not objects of sexual attention. But they were also not sexual competitors, since they were, at first, too young. Nonetheless, the immature sons did present the father with one annoyance: Women fed them and gave them other expressions of mother love which once had been his sole possession. His anger at competition over what continued for him to be mother love had many possible expressions. One was to do nothing. Another was to stop the women from feeding the boys, who then may or may not have survived on their own. A third—and the key to the story of *our* primal father—was to kill and eat the boys. Certainly there were other possible expressions, each one leading to different cultural formations of the Oedipus crisis. As in the original accident to the bisexual troop, it was undoubtedly an accident here that led the primal father to prefer one expression over another.

Our primal father may have killed the boys because he wished to strike back at the women for neglecting him. He may have eaten the boys because he thought that eating them would be a way to get back the food that was rightfully his. Whatever the case may be, the father apparently preferred the third emotional logic to any other, and thus became, or tried to become, a cannibal.

There is little question that the women tried to stop him from killing the boys. After all, they loved the boys sexually and, so they thought, as parts of their bodies. In some troop such as ours, the women must have succeeded in stopping the murders—perhaps by force, but just as likely by making a deal with the father.

The deal was that the father would not kill the boys and would allow the women to feed them while they were young, in exchange for which the women would stop feeding the boys once they reached maturity. They also agreed not to have sexual relations with the boys and eventually to drive them from

the troop, leaving the father as the sole permanent beneficiary of their care and sexual attention. The prohibition against cannibalism and the expulsion of the grown sons thus began together in a deal proposed and defended by women to allow their sons to reach maturity. So, it was probably not the father who expelled the sons, but the women instead. Expulsion probably was not even the father's idea, though his bisexual nature, which his early experiences had not entirely effaced, undoubtedly favored it over murder.

It is this deal that was the first law—the prohibition against cannibalism. The first law was women's law, not, as Freud says, the incest taboo or the regulations governing totemism. The anchors of the prohibition against cannibalism were the expulsion and the women's agreement not to have sexual relations with the sons. Accompanying the prohibition against cannibalism was, to be sure, a precursor of the incest taboo—the women's agreement not to have sexual relations with the sons. Yet this was not law, since it is unclear whether the sons agreed to stay away from the women, and law, to be binding, must speak to everyone whose behavior it commands, sons as well as women. Otherwise, it is but force herding beasts. Whether the sons agreed to stay away from the women is less important at this juncture than that the women agreed to stay away from the sons, not to have sexual relations with them and not to provide them with food. The women's agreement was not law, also, because a condition of its fulfillment was the expulsion of the sons. Law must tempt in order to bind, and the women could not effectively be tempted once the sons were gone.

The sons' homosexuality, so important in Freud's version of the story, is less so here. The sons may have agreed to have sexual relations only among themselves, but they probably did not start having sexual relations with each other during the expulsion. They simply continued doing what they would have done anyway had they not been expelled. Their identification with the father did not efface their bisexuality as thoroughly as their father's had been, for unlike the father they had not been raised solely in the company of women. They did lose the practical occasion for sexual relations with the horde's women, but not the desire. They could have drifted off to join other, still bisexual, troops or challenged other primal fathers. Many undoubtedly did. Why did others stick around?

The reason is this. The sons continued to want the horde's women to feed them, just as they continued to want sexual relations with these women. Nonetheless, their desire to be fed was different than sexual desire. The deal the women made was that they could continue to feed the sons, but not have sexual rela-

tions with them. The sons experienced one woman or a small number of women feeding them, but they did not experience sexual relations with women. The sons would thus have considered expulsion by the women to be a rejection of care more than a rejection of sexual relations, which they never had with these women in the first place. They would also have seen the women feeding the father as their recognition of his interest in them, an interest the sons likewise never had. The sons regarded the father's interest as an interest in care, not exclusive sexual access. The women, in turn, forced the sons to recognize the father's interest—to recognize their care and sexual attention as the father's property. It was this recognition that the sons wanted.

Were sexual attention from women what they wanted, they could have left the fringes of the horde for women in other troops or hordes. But no other women could have given them recognition. Women in bisexual troops would not have known what they were talking about, and women from other hordes were not the ones who cared for them and then drove them away. It was only recognition from the women of *their* horde that counted. Only *they* were property.

So the sons banded together to kill the father and get care and recognition of the right to care. They did not kill the father simply to have sexual relations with women, since women of neighboring bisexual troops were surely available. Nor did they kill him to get exclusive sexual possession of the women. That would not, in any case, have been possible for a band of brothers at this point, and the brothers would have wanted it only for the purpose of identifying with the father, not firsthand as a result of their own experience.

If all the brothers had wanted was care and sexual relations, they could have returned to the women, commenced bisexual relations, and resumed getting care. But care and sexual relations were not all they wanted. It was recognition of a *property interest* in care that drove them to hang around the fringes of the horde and to kill the father. And the recognition they wanted was from the very women who stopped caring for them and drove them out. The brothers were angry at these women and probably not inclined at first to have sexual relations with them. The women might very well have been able to overcome any anger they felt about the murder, but for a disaster that occurred right after.

Because the brothers were angry at the women for not taking care of them and for expelling them from the horde, the brothers decided to transgress the women's prohibition against cannibalism: They ate the murdered father. The brothers killed the father, not just to take his property in the women, but also to

eat him, to strike back at the women for rejecting them by transgressing the women's law. By eating the father the brothers expressed their rage at the women for depriving them of recognition and food. Their transgression must also have enraged the women. Any chance that the women would have wanted sexual relations with the brothers, who had transgressed the very law that allowed them to live, was now gone.

The transgression might eventually have been forgotten, but the brothers did not want it to be. They decided to repeat their consumption of the father as best they could by making a symbol of him out of an animal, which they killed and ate as if they were killing and eating the father. In doing so they wrested the power to confer recognition from the women. With the advent of the sacrificial meal, the brothers, not the women, decided who gets recognition by the provision of food, who gets a seat at the table.

The brothers became like women. The sacrificial meal was a product of the brothers' desire to control the distribution of recognition. It was an ongoing assertion of power, not (as Freud maintains) an expression of remorse over the murder and consumption of the father. It was a celebration and recollection of their transgression. "We can break your law, if we wish," they say, "and we do break it in spirit. But there is nothing you can do about it, since we are not breaking your law in fact." The price the brothers paid for controlling the distribution of recognition was that they accepted the women's law in fact, even as the totem sacrifice violated it symbolically. The totem sacrifice is thus at once the brothers' assertion of power over the distribution of recognition and their reconciliation to the law of women. The reconciliation preserved the possibility of transgression, and it is this possibility that was, of course, at the root of the brothers' usurpation of control over the distribution of recognition.

The brothers became like women in a second sense. They did to the women what the women had done to them. They expelled them from the horde in order to complete their control over recognition. Freud figures that the brothers renounced the women out of remorse for killing the father. Surely the brothers did feel remorse, but this is not what led them to renounce the women. Renunciation of the women followed upon the rage the brothers and women felt for each other and the struggle between them over the distribution of recognition. Remorse for killing the father led the brothers in quite a different direction: to disavow their homoerotic practices. This they did in order to be like the father, to live his heterosexual life.

So, the brothers renounced the women in order to control recognition, to be like the women. They renounced pleasure in

each other in order to atone for killing the father, to be like the father. The sacrificial meal accomplished both objectives.

There was one objective the meal could not accomplish. The brothers could say who got recognition among themselves, and probably even could have forced the women to provide care according to their scheme of distribution had they not expelled them. But they could not have forced these women *to recognize* the scheme of distribution, which is exactly why the brothers needed to expel them. Who got a seat at the table meant nothing outside the brothers' homoerotic circle. Better to have women who would recognize the scheme as well as conform their distribution of care to it.

Also, the brothers still wanted women for care and sexual relations. They just did not want women who had rejected them. So, they resolved to replace these women with others. They could try this several ways, each setting each horde, once again, on its own peculiar course of cultural development.

First, they could decide not to expel the women after all. They would then give up the right to control the distribution of recognition. It is doubtful whether the horde would then return to the original bisexual condition. What takes place after such a decision remains something of a mystery.

Or, they could capture women from other troops or hordes. Surely captured women would have felt much the same about the brothers as did the horde's women. Perhaps the brothers could have forced them to distribute care the way the brothers wanted, but the brothers almost certainly could not have forced them to recognize the rightness of the distribution. Even so, daughters of captured women may well have accepted the brothers' regime, especially if men took them from their mothers early on. We are much more familiar with the culture in which daughters of captured women accept a scheme of recognition than the culture of hordes that revert to the bisexual condition.

Or, the brothers could get the agreement of women from bisexual troops to come live with them. Why would such women choose to acknowledge an oppressive regime so foreign to their experience? Perhaps their troop lost its men, just like the horde, and the brothers were the best deal available. It would have been easier for consenting women than for captured women to accept the brothers' regime, and consenting women would certainly have raised daughters differently, so that the men would not have had to remove them. Yet, we do not know much about differences between daughters of captured women and daughters of consenting ones, even less about the differ-

ences in culture yielded by these two roads to acknowledging schemes of recognition.

Finally, the brothers could get the agreement of brothers from other hordes to trade women. Freud and others assume that agreements like this were the source of the emotional and cultural conditions with which we are most familiar, and the path to civilization.[26] Certainly they are the path to rules.

The trade would be all women of one horde for all of another. Unlike the guardians in Plato's *Republic*, however, neither set of brothers would share women in common.[27] Women would be allocated, brother by brother, according to each horde's scheme of recognition. Two schemes were thus acknowledged by two sets of brothers and by two sets of traded women. Why would women acquiesce to the scheme of another horde, but not to the scheme of their own? Why did the brothers not share women in common, as if in a bisexual troop?

Surely traded women did not forget that their own brothers had transgressed the prohibition against cannibalism, and stayed angry at them, even once they arrived in the new horde. But their rage must have been softened when they were traded, not herded out into the wilderness. To trade women was to take care of them, to make sure they had a place to go. The brothers were behaving almost like members of the old bisexual troop. Also, whatever rage the women felt towards their brothers would not have been directed against their new mates. Even if, as I am supposing, the new brothers ate their own father, they were not the ones who ate the father of these women. Accepting the new brothers' scheme of recognition was less emotionally taxing than overcoming their own brothers' rejection and transgression.

Also, the women must have felt remorse for having expelled the brothers. The remorse was probably not enough to overcome their rage, but surely helped them to accept the new scheme of recognition. It was thus women's remorse, not the brothers', that permitted hordes to exchange women.

Turning expulsion into trade solved a number of emotional dilemmas for the two sets of brothers, as well as the practical dilemmas that Freud underscores.[28] The brothers could get rid of their own women while having others serve their needs. They

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[26] Strangely, Freud never resumes the discussion of exogamy, left off in TOTEM UND TABU, *supra* note 5, at 180, and in TOTEM AND TABOO, *supra* note 5, at 157, after his derivation of totemism and the incest taboo from the murder of the primal father. Hence, Freud never directly discusses the exchange of women by two bands of brothers.

[27] PLATO, THE REPUBLIC 457c-d (Allan Bloom trans., 1968).

[28] TOTEM UND TABU, *supra* note 5, at 198; *see also* TOTEM AND TABOO, *supra* note 5, at 178-79.

could mimic their father's practice of exclusive sexual possession while possessing women in common based on rules of allocation established by the homoerotic organization. Most importantly, they could ratify control over the distribution of recognition by getting women involved in it.

Allocating women also gave the brothers a new reason for maintaining their homoerotic organization. After all, the brothers had given up their homoerotic practices, but not their homoerotic feelings. They experienced these feelings, to be sure, with a sense of guilt for killing and eating the father. Henceforth, homoerotic feelings among men would always be accompanied by a sense of guilt, and for most the only tolerable expression of these feelings would be the organization the brothers had created during the expulsion, when they were excluded from women. The brothers' organization narrowed and focussed the homoerotic practices of men in the bisexual troop. Unlike erotic relations with men in the bisexual troop, which were always in the company of women, the brothers' organization practiced an eroticism with men apart from women, a real homoeroticism. This homoeroticism absolutely required, however, an allocation by the brothers of heterosexual relations with, and care by, women.

The first aim of the brothers' organization had been to kill the father. But that was done. The next was celebrating the totem meal to spite the women. But once they were traded away, there was no one to spite. The totem meal ceased to spite women, serving instead only to allocate control over their distribution.

CONCLUSIONS

The retold story reveals that a fragment of right preceded the institution of duty. The fragment appeared in the series of events leading to the sons' expulsion by the women.

The father's demand that the women bestow care and sexual attention only on him evidenced a need for recognition. This need, which is at the heart of the institution of right, summarizes an emotional archeology. The first layer in this archeology was the father's renunciation of homoerotic attachments. Next was his rage against the women for taking care of the boys, hence not directing care only to him. Last was the father's thought of eating the boys in order to take revenge on the women and get back the food that was rightfully his. The need for recognition may thus be associated with three emotional vectors: a renunciation of direct homoerotic

attachments; rage at not being the exclusive beneficiary of care; and the thought (not the deed) of cannibalism.

But the need for recognition is only half of right. The other half is the willingness to grant recognition. The women were not yet ready for this, not to mention the father or brothers. For practical and emotional reasons the women insisted on feeding the boys. The father was not in a position to demand exclusive care and the women were not emotionally prepared to give it. What the father got instead was a quid pro quo, where the women agreed to expel the boys once they reached physical maturity.

How the women were able to agree with the father was not part of my story. The moral and emotional ability to make agreements undoubtedly arose during events leading to the formation of the bisexual troop, which my story takes as a starting point. What made the troop? We get the answer from a prior story. Even without telling that story, we know what it must cover. A troop has a language. Its members organize a defense. They agree on what is beautiful and what is disgusting. These are the components of an ability to make agreements, which the primal father's story presupposes.

It is possible to imagine that, by performing their promise, the women did recognize the father's right to exclusive care at the moment it became practically and emotionally available. Yet, it is far more likely that the women performed because they wished to protect boys still within their care, not because they were giving the father the recognition he demanded. The women acted as if they recognized the father's right to care, but, in reality, were just protecting boys. Holders of a right want more than behavior consistent with the right. They want recognition, an alliance of the motives of other persons with their own motives, and they are willing to tolerate behavior inconsistent with the right—what else is life but compromise?—so long as they get that alliance.

The alliance of women with the motives of right-holders was to come much later, only after the events creating the institution of duty. Thus, between a fragment and the full institution of right was the appearance of the full institution of duty. Emotionally and jurisprudentially it makes perfect sense that only right-holders who have experienced the force of duty can get others to ally with their motives.

Unlike the institution of right, which unfolds over the entire course of the primal father's story, the institution of duty arises in a single event: the totem sacrifice. Just like the father's need for rec-

ognition, the brothers' need to sacrifice summarized an emotional archeology. The first layer in the archeology of sacrifice was the brothers' rage at having been expelled by the women. Next came their turn to exclusively homoerotic attachments, then their formation of a homoerotic organization for killing the father and transgressing the prohibition against cannibalism. Last was the reenactment of the transgression as sacrifice. The aim of reenactment was to spite the women, renounce the transgression, and take control over the distribution of recognition. The need for sacrifice, which lies at the heart of the institution of duty, has emotional vectors paralleling those of right: rage against women for expulsion; a turn to exclusively homoerotic attachments; transgression; and renunciation of transgression.

The institution of duty replaces actual cannibalism and literal transgression with symbolic cannibalism and metaphorical transgression. Freud emphasizes the brothers' wish to incorporate the father's ideal qualities. Surely he is correct that the totem meal expresses this wish, and the legal incidents surrounding the totem meal confirm his intuition. Achieving ideals is an essential component of duty—we become better people by fulfilling our duties. But this is not the only component.

The other components of duty flow from the totem meal's celebration of transgression and renunciation. This ideal expressed the brothers' relationship with the father. Their transgression and renunciation expressed their relationship with women. Participation in the ideal depended on transgression—the brothers could incorporate the father's qualities only by breaking the women's law. Indeed, the qualities became ideal only as a result of transgression. Without it, these qualities would have been alien to the brothers—a lion's ferocity, a hurricane's strength, a fox's cunning. The brothers were fit to absorb the qualities only once they renounced transgression and returned to the law of women. But transgression is meaningless without an ideal. The brothers would not have cared that they broke the women's law had they not wanted to maintain their father's relationship with them. That relationship depended, in their view, on the very qualities that became ideal in the course of their transgression.

Once the brothers transformed transgression into sacrifice, their impulse towards cannibalism and the destructive desire for transgression became unconscious: They were experienced indirectly by participants in sacrifice as symbols, not directly in their

own terms. Duty is the symbol of cannibalism, transgression, and renunciation, wherever it is found.

The appearance of the full institution of duty added a second component to the initial form of right. In the regime of the father *only* the father had a right. The right he had was the primitive, partial demand for recognition. In the regime of the brothers, all had rights. To the demand for recognition, the brothers added mutuality of recognition. They affirmed in each other joint control over the distribution of care. This component of right may be associated with the development of the brothers' homoerotic solidarity in the era after the murder. Mutual recognition at once preserved the brothers' homoeroticism and renounced it, just as sacrifice preserved and renounced cannibalism.

Mutual recognition prepared the brothers for sexual relations of a sort with the women. But the relations were heterosexual in appearance only. They were homoerotic in fact. The brothers' homoeroticism became unconscious, just as cannibalism and transgression had become in sacrifice. Heterosexual practice was a form veiling homoerotic aims.

The institution of rules accompanied the brothers' formal return to heterosexuality. Rules may be associated with the double repression of the emotions accompanying duty and right. The famed "neutrality" of rules is an ongoing sign of this double repression. The cannibalism, transgression, and homoeroticism of the brothers became part of a dynamically repressed unconscious, rather than symbolized or formalized as duty or right. Rules were a consequence of the exchange of their women for women of other groups. The institution of rules subdued, but did not resolve, the ongoing tensions between the brothers and the women implicit in duty and right—the brothers' endless repetition of transgression and renunciation, their response to the women's desire for sexual relations with homoerotic possession. The experience of following and enforcing rules involved neither the cannibalistic wish to sacrifice nor the homoerotic need to achieve mutual recognition. Rules repressed the emotions of sacrifice and mutual recognition, so that men and women who are governed by rules are aware of these emotions only in fits and starts. Nonetheless, the emotions are always ready to jump out from the placid surface of rules, disrupting their arrangements.

Rules also made possible the last component of right: bestowal of recognition by the women. Mutual recognition was confined to the band of brothers, where equal right-holders recognized in each

other the capacity for rights. There was no recognition by the objects of right, the women. The institution of right thus fell short of satisfying the need for recognition, which had set men on the path of right in the first place, until the objects of right joined the circle of recognition. Women joined the circle by recognizing the brothers' scheme of distribution, as a result of their exchange between the bands of brothers.

One question implicit in the participation of women in the brothers' circle of recognition is whether the brothers would always treat them only as bestowers of recognition. Would the women themselves acquire a need for recognition, and join the band of brothers as right-holders? Would the brothers accept them as right-holders, or be willing to serve as bestowers of recognition? These questions have answers. The answers are still being written. But that is another story.